No. 14978

United States
COURT OF APPEALS
for the Ninth Circuit

THE GRAY LINE COMPANY, a corporation,
Appellant,

vs.

R. C. GRANQUIST, District Director of Internal Revenue,
Appellee.

APPELLANT'S BRIEF

Appeal from the United States District Court for the District of Oregon

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JURISDICTIONAL STATEMENT

This is an appeal from a judgment entered on October 21, 1955 by the U. S. District Court for the District of Oregon dismissing Appellant's complaint (Tr. 51).

In January, 1953, the Commissioner of Internal Revenue assessed to and against Appellant transportation taxes, penalties and interest in the total amount of $708.51 and, on March 31, 1953, Appellant paid the assessment to the Appellee (Finding 4, Tr. 43). The taxes were purportedly assessed under Section 3469 of the Internal Revenue Code of 1939, Title 26, United

States Code (Tr. 4, 43). (Said section will herein be referred to as Sec. 3469.)

Appellant, on April 17, 1953, filed with the Appellee, on Form 843, Appellant's claim for refund to it in the sum of $708.51, together with interest at the rate of 6% per annum from March 31, 1953, as provided by Title 28, United States Code, Sec. 2411 (Finding 5, Tr. 43). The Commissioner of Internal Revenue of the United States rejected this claim for refund on January 12, 1954 (Tr. 5, Finding 6, Tr. 44).

On June 10, 1954, Appellant filed with the District Court of the United States for the District of Oregon its complaint wherein it prayed for judgment against Appellee in the principal sum of $708.51, together with interest at the rate of 6% per annum from March 31, 1953, as provided by law (Tr. 2-19), and on August 5, 1954, the Appellee filed his answer to the complaint (Tr. 20, 21).

This case arises under the laws of the United States providing for Internal Revenue and jurisdiction was conferred on the District Court by Title 28, United States Code, Sec. 1340.

On October 21, 1955, the District Court (Solomon, J.) made and entered its final judgment against the Appellant (Tr. 51, 52). Jurisdiction to review judgments of the District Courts in cases such as this is conferred on this Court by Title 28, United States Code, Sec. 1291.

Timely notice of appeal and Bond on Appeal were served on the Appellee and were duly filed (Tr. 52-54).

STATEMENT OF FACTS

During July, 1950, (the month involved) Appellant was engaged in the business of furnishing transportation, sightseeing and airport transportation for hire. One of Appellant's July, 1950, activities was that of providing and operating a limousine service for airline passengers (Finding 7, Tr. 44, 65).

During July, 1950, Appellant provided such service for Northwest Airlines, Western Airlines and Pan American World Airways (Tr. 74). Only seven-passenger limousines were used (except on one occasion hereinafter mentioned) (Finding 8, Tr. 44, 81, 82, 87, 89, 90). On none of the trips (except the one mentioned) were more than Seven (7) adult passengers carried (Exs. 2, 3, 4). When not in use the limousines were kept at the Appellant's garage at 5th and Hoyt Streets, Portland, Oregon (Tr. 82).

An August 21, 1949, contract (Ex. 22) between Appellant and Northwest Airlines, Inc. recites that "the parties hereto desire to enter into an arrangement covering the transportation of Second Party's [the airline's] passengers and employees between the Airport and the City of Portland and vicinity." By the terms of the agreement the airline agreed to recommend that its passengers use the limousine service, and the Appellant agreed to coordinate its service with the arrival and departure times of airplanes and to carry the airline passengers and employees at designated rates. Also the agreement provided that whenever unscheduled flights

terminate, hold or originate at the Portland or Troutdale Airports, Appellant will make no fare collection and in lieu "shall bill Second Party [the airline] as per the applicable rates." The agreement could be terminated by either party giving the other 30 days written notice (Ex. 22, Tr. 101).

Appellant had no contracts with Western Airlines or Pan American World Airways, although it also furnished similar limousine service for their passengers and employees (Finding 7, Tr. 44, 69, 70).

The nature of the airport limousine service was "on call" service, meaning that no trips were made unless Appellant was notified by the airplane companies that there were passengers desiring transportation. Actually the limousine driver called the airline companies most of the time, as Appellant employed no dispatcher in July, 1950 (Finding 13, Tr. 46, 68). This "on call" service did not mean Appellant was obliged to meet all scheduled flights (Tr. 69).

Airline passengers, when purchasing tickets for air transportation, were asked by employees of the airlines whether they desired limousine service to the airport or whether they would use their own transportation. In case the airline passenger desired such limousine service, the airline made arrangements with the passenger with respect to where the passenger desired to be "picked up" by the limousine. This would often be at the offices of the airline company or at a hotel. The hotels were usually the Old Heathman or the Multnomah (Finding 10, Tr. 45). Passengers would also be picked up elsewhere

if they so arranged with the airline and the latter notified the Appellant's driver to do so (Tr. 88). In some instances the passengers boarded the limousines at the Appellant's garage (Tr. 75). The passengers were advised by the airline of the time the limousines would depart (Finding 10, Tr. 45), and the limousine drivers were notified the places to pick up passengers (Finding 13, Tr. 46).

The Appellant did not determine the points at which passengers would be picked up (Finding 10, Tr. 45). The airline companies established them prior to each trip at places convenient to their passengers (Finding 10, Tr. 45). Actually this was done with the passengers deciding on the place at which they would board the limousine (Tr. 83).

The limousine driver whose turn it was to make the next trip would telephone to the airline company and ascertain the names of the passengers he was to take to the Airport, the places they were to get in the limousine, and the take-off time of the plane. He would then drive to the designated places, "pick up" the passengers and proceed to the Airport (Finding 13, Tr. 46, 75, 86, 90).

By these calls the Appellant would ascertain whether or not there were passengers who desired or who might desire the limousine service (Tr. 70).

The limousines would go only to the places where there were passengers desiring transportation (Finding 13, Tr. 46, 71, 75). If on a particular trip there were no passengers to be picked up at one or more of the places normally designated by the airlines and the passengers,

then the limousines would not go to such place or places (Finding 13, Tr. 46, 71).

The limousines also operated from the Airport to the downtown area (Finding 14, Tr. 46, 47).

Upon arriving at the Airport and unloading the passengers, the limousine driver would ascertain from the airline when the next plane was due to arrive, and if the plane was due within a reasonable time and if there appeared to be passengers aboard the plane who desired or might desire transportation from the Airport, the driver would wait until the plane arrived and was unloaded. He would then transport from the Airport any passengers who desired the limousine service. If it appeared that no planes were due to arrive within a reasonable time, carrying passengers who desired or might desire limousine service from the Airport, the driver would return directly to Appellant's garage with an empty vehicle; however, Appellant tried to avoid having the limousine travel without passengers, which is called "deadheading", and drivers would wait at the Airport as much as two (2) hours for the arrival of planes carrying passengers desiring limousine service. If there were no limousine at the Airport which could meet an incoming plane and no limousine would arrive there with passengers in time to meet the incoming plane, then Appellant would send a limousine directly from the garage to the Airport to meet the incoming plane, provided there were passengers on such aircraft who desired or might desire limousine transportation (Finding 14, Tr. 46, 47).

Passengers being brought from the Airport were let out anywhere in the Portland downtown area, an area approximately 17 blocks wide (east & west) and 22 blocks long (north & south) (Ex. 13). Said area is bounded by:

Columbia Street on the South,
Union Station on the North,
Willamette River on the East,
About 16th Avenue on the West.

The passengers could get out anywhere in that area, including the Union Station, without extra charge (Tr. 72, 73, 77). The discharge places in the downtown area varied from day to day (Tr. 88, 90, 91).

On request a passenger could get out of the limousine on the East Side (of Portland) on a trip from the Airport. The limousine would leave the street it was traveling on to do this if requested to do so by the passenger, if the place designated were in the general direction of downtown Portland (Finding 11, Tr. 46, 76).

Appellant's garages were located at 6th and Irving and 5th and Hoyt Streets (near the North boundary of the downtown area). "Deadhead" trips to Airport would originate at the garage and on such trips the limousine would not go to the downtown area (Tr. 79), and when a limousine returned from the Airport without passengers, it returned to the garage without first going to the downtown area (Finding 14, Tr. 47, 79, 80, 87, 90).

A limousine was not driven to the Airport unless there were passengers to carry there or unless there were arriving passengers who desired or might desire service

(Finding 15, Tr. 47). Only twenty-five (25%) per cent of all airline passengers used limousine service (Finding 18, Tr. 48). Therefore, there were times when planes would either come in or leave Portland when no trips at all were made (Finding 15, Tr. 47, 88, 90, 91).

Appellant was not required to meet all incoming planes (Tr. 69, 78, 79). If no passengers on an incoming plane wanted the limousine service, no limousine was sent to meet the plane (Tr. 78, 79).

Approximately ten (10%) percent of all flights were postponed by the airlines due to weather conditions or other causes (Finding 18, Tr. 48).

The Airport is approximately ten (10) miles from the downtown district of Portland (Finding 16, Tr. 48). Appellant's limousine traveled each way between nine (9) and twelve (12) miles per trip (Exs. 2, 3, 4).

The Appellant did not establish or recommend any route over which its limousines were to go between Portland and the Airport (Finding 20, Tr. 48, 74, 86). No public authority specified any such route (Finding 20, Tr. 49, 69, 82). The drivers did not follow any set group of streets in traveling to or from the Airport (Tr. 75, 87). The limousines were operated over whatever route the driver desired to travel to suit his own convenience or that of the passengers (Tr. 71, 76).

There was never a time when the driver did not use his own discretion or was not "at liberty to pick the route either to or from" the airport. The drivers did not usually follow the same route. Some varied it to suit

their convenience (Tr. 75, 76, 83, 87). No one ever instructed the drivers to use any particular streets (Finding 20, Tr. 48, 86, 90). The routes followed by the drivers varied "from day to day, from trip to trip" (Tr. 87, 89, 90).

Appellant did not publish or post or print any schedules of its service. It did not advertise that it was operating this service (Finding 20, Tr. 48, 49, 68, 82).

None of the limousines bore any signs, except one, on which were painted the words "Gray Line Limousine Service" (Finding 8, Tr. 45). Passengers were not "picked up on the way from the airport. As the limousines (except the one) were not lettered, they looked like private cars; and as there were no regular routes, "there would be no point in a person stopping [what appeared to be] a private limousine" (Tr. 84). The general public was not hauled (Tr. 87, 90).

Sometimes, after calling the Airport, the situation would change; there would be a delay of an hour due to weather or mechanical trouble, or the driver would not even go out on the call (Tr. 91).

When Appellant's equipment, such as buses, was used for sightseeing as distinguished from its limousine service, the transportation tax was paid by the passengers (Tr. 66).

The airline companies did not sell or issue tickets in connection with flight passage that were good for transportation to or from airports in the Appellant's limousines (Finding 9, Tr. 45).

Appellant's one way charge for transportation to or from the airport was one ($1.00) dollar for airline passengers and (60¢) for airline company employees. The limousine drivers collected these amounts in cash from its passengers, except that the charges for the trips of airline crews based in cities other than Portland, Oregon, were billed to the airlines monthly (Finding 19, Tr. 48, 77, 78). If a flight were cancelled after passengers had been taken to the airport, the particular airline, and not the passengers, was charged by Appellant and paid for the transportation (Tr. 78).

The drivers made a waybill for each trip or round trip (Ex. 2, 3, 4) and turned these in daily to the Appellant, together with all cash collected by them (Finding 21, Tr. 49, 77).

Appellant did not collect or attempt to collect any sum as a tax from any limousine passenger (Tr. 80, 81). Nothing was set aside by Appellant or regarded by it as a tax (Tr. 81). The drivers never had any discussion about transportation taxes with any passenger (Tr. 87, 90, 91).

The tax assessment involved in this case was paid by Appellant with Appellant's funds (Tr. 82).

Appellant's books and records did not reflect the collection of transportation tax from the airline passengers, and none of the limousine revenue for July, 1950 was shown on the Appellant's books as a tax obligation (Finding 28, Tr. 50). The full amount collected by Appellant as fare for its airport limousine service was reported by Appellant as income (Ex. 6, 7, 10).

On Appellant's bus operations there is a tax which Appellant recognizes and collects. Appellant maintains a separate account known as "Other Current Liabilities, Transportation Tax," in which Appellant enters the tax collected from the passengers on its said bus operations (Ex. 9, Tr. 92, 93, 94). Appellant records as income only that portion of the money paid by said bus passengers not accounted for and set aside as transportation tax. Thus, Appellant's records for July show a tax liability of $4,-512.05, no part of which is in connection with the air-port operations, or was recorded by Appellant as income (Exs. 6, 8, 9, 10). The tax so collected was duly paid by Appellant to the then Collector of Internal Revenue for Oregon and is not in issue in this case.

When the payment was made of the assessment involved in this case, the payment was charged to an account called "Other Deferred Debits," was neither entered nor recognized as a tax liability, and was not deducted from Appellant's income. In other words this payment was not treated by Appellant as a tax or as a tax obligation (Tr. 92, 93), but was regarded by Appellant as an "Accounts Receivable" (Tr. 94).

The issues presented in this case have been the subject of discussion and dispute between Appellant and the Bureau of Internal Revenue since 1948 (Tr. 68). During the entire period Appellant has maintained and contended that limousine transportation furnished airline passengers was specifically exempted from the provisions of sec. 3469 (Ex. 1, 11, 14). Appellant was so informed by a Deputy Collector of Internal Revenue (Ex. 1, Tr. 16).

Appellant's attorneys advised it that sec. 3469 did not apply to its airline service (Ex. 1, 14, Tr. 17).

The Commissioner of Internal Revenue recognized that Appellant did not collect the tax from airline passengers during the period January, 1947 through March, 1947 (Ex. 21, Tr. 98). Except for an increase in the amount of fare on August 21, 1949, Appellant's service was identical in July, 1950, as in January through March, 1947.

Appellant has consistently followed its attorneys' advice and has not collected any tax from airline passengers for transportation by limousine (Tr. 80, 81).

STATEMENT OF THE CASE

During the month here involved, Appellant was and still is a corporation under the laws of the State of Oregon with its principal office in the City of Portland, State of Oregon (Finding 2, Tr. 43).

At all times from November 1, 1952, to the date hereof, Appellee was and now is the duly qualified and commissioned and acting Director of Internal Revenue (District Director of Internal Revenue) for the State of Oregon (Finding 3, Tr. 43).

During the said month Appellant had a contract (Ex. 22) with Northwest Airlines, Inc., to provide surface transportation services for airline passengers and employees of Northwest Airlines, Inc. Appellant provided similar transportation for air passengers and employees of Western Airlines and Pan American World

Airways, although it had no contract with the last mentioned airline companies (Finding 7, Tr. 44).

During the month seven passenger limousines were used, except on one isolated case, by Appellant in providing said services and transportation by these vehicles only has raised the issues with which we are concerned in this case (Finding 8, Tr. 44, 45).

The Commissioner of Internal Revenue assessed and Appellee collected transportation taxes, penalties and interest from Appellant on the theory that Appellant was operating its said limousines on an established line within the meaning of sec. 3469. Appellant instituted this action against the Appellee to recover the amounts collected, alleging that its limousines "were not operated on an established line" (Tr. 4).

On the 24th day of January, 1955, this action was tried to the Court without a jury, witnesses were sworn and testified on behalf of the Appellant, and the Appellant introduced documentary evidence (Exs. 1-14). No witnesses were called or testified on behalf of the Appellee. The Appellee introduced documentary evidence (Exs. 21, 22). All exhibits introduced are now in the possession of the Clerk of this Court. Throughout the trial the Appellant contended that the limousine service it provided did not amount to operating motor vehicles "on an established line" within the meaning of sec. 3469, which provides in part as follows:

> " . . . Such tax shall apply to transportation by motor vehicles having a passenger seating capacity of less than 10 adult passengers, including the driver, only when such vehicle is operated on an established line."

Appellant also contended at the trial that the fares charged for transportation in its limousine service did not include any transportation taxes, that it did not collect from or "pass on" the transportation taxes to the passengers transported, and that it had not "willfully" failed to pay or collect any transportation taxes.

The trial court made findings of fact in which it included only a portion of the facts bearing on the question of whether or not in providing such limousine service, Appellant was operating its limousines "on an established line" within the meaning of sec. 3469, and in which it included as facts statements contrary to the uncontradicted evidence in this case. These findings are set forth as paragraphs numbered 7 to 20, inclusive, and 29 of the findings of fact (Tr. 44 to 50). These findings omitted uncontroverted, important, material and ultimate facts bearing upon this question. These omitted facts are set forth in subparagraphs (1) through (5) of Specification of Error I of this brief.

The trial court made findings of fact in which it included only a portion of the facts bearing upon the question of whether or not the money collected by Appellant from the limousine passengers included transportation taxes. The findings are set forth as paragraphs numbered 22, 23, 24, 25, 26 and 28 of the Findings of Fact (Tr. 49, 50). These findings omitted uncontroverted, important, material and ultimate facts bearing upon this question. These omitted facts are set forth in subparagraphs (6) through (12) of Specifications of Error I of this brief.

The trial court's findings of fact which omitted uncontroverted, important, material and ultimate facts showing that the assessment and collection of the penalty from the Appellant was not proper. These omitted facts are set forth in subparagraphs (6) and (12) of Specification of Error I of this brief.

The trial court found and concluded that Appellant was operating its limousines "on an established line" within the meaning of sec. 3469; that the Commissioner's assessment and the collection of said taxes, penalties and interest by Appellee was proper; and that the money paid to Appellant by limousine passengers in traveling to and from the airport included the transportation tax and was collected or paid to the Appellant as a tax. The trial court based its judgment on said findings and conclusions and dismissed Appellant's complaint.

Appellant contends that the trial court clearly misapprehended the facts in this case and omitted from its findings the uncontroverted, important, material and ultimate facts to which reference was above made. As in the trial court, Appellant here contends that the transportation services it provided during said period did not amount to operating its said limousines "on an established line" within the meaning of sec. 3469; that the Commissioner's assessment and the collection of said taxes, penalty and interest by the Appellee was not proper; that the money paid to Appellant by limousine passengers traveling to or from the airport did not include transportation taxes and was not collected by or

paid to Appellant as a tax; that Appellant has reasonable cause for its failure to collect any tax from such passengers; and that Appellant had not "willfully" failed "to pay, collect, or truthfully account for and pay over" any tax within the meaning of Section 1718(c) of the Internal Revenue Code of 1939. (Said section will herein be referred to as sec. 1718(c).)

Based upon the general propositions and contentions set forth above, Appellant also contended and now contends that:

(1) Said transportation service was specifically exempted from the tax imposed by sec. 3469;

(2) Appellant was not and is not liable for any transportation tax for the transportation of airline passengers in its limousines;

(3) The assessment and collection of said purported taxes, penalties and interest were and are unlawful; and

(4) Appellant's complaint should not have been dismissed.

The trial court, in deciding this case, treated Regulation 42, Section 130.58 as though it had the full force and effect of law (Tr. 32). Appellant contends that said regulation does not have such force and effect, and that insofar as it is contrary to and limits the provisions of sec. 3469, said regulation is null and void.

SPECIFICATIONS OF ERROR

I

The trial court erred in failing to include in its findings part or all of the following facts:

(1) The August 21, 1941 contract between Appellant and Northwest Air Lines, Inc. recited that the agreement covered the transportation of the airline's passengers and employees "between the Airport and the City of Portland *and vicinity*" (Emphasis supplied) (Ex. 22, Tr. 102). The said agreement contemplated that Appellant would furnish limousines in providing said transportation, and the fare to be charged by Appellant was determined without regard for transportation tax (Ex. 22, Tr. 102, 103). The agreement could be terminated by either party giving the other thirty (30) days notice (Ex. 22, Tr. 106).

(2) Airline passengers who desired limousine service would arrange with the airline ticket office where Appellant's limousine would pick them up. The passengers would be "picked up" at points convenient to them, usually at the offices of the airline company or at a hotel (PTO 10, 12, Tr. 24, 25). The hotels were mainly the Old Heathman or the Multnomah (Tr. 70, 71), but passengers would also be picked up at the Benson Hotel (Tr. 88). In some instances passengers boarded the limousines at Appellant's garage (Tr. 75) or at any other place in downtown Portland such as a depot or restaurant if such were designated by the airline at the request of the passenger (Ex. 22, Tr. 103).

(3) The airline companies, for the convenience of their passengers, prior to each trip made by Appellant's limousines from the downtown area of Portland to the airport, informed Appellant's drivers where to pick up passengers (PTO 12, Tr. 25).

These places were selected by the airline and by the passengers (Tr. 83), not by Appellant. Appellant's limousines would be driven only to the places where there were passengers who had arranged with the airline for limousine service (PTO 12, Tr. 25, Findings 13, 15, Tr. 46, 47, 75, 86, 90).

(4) Passengers being brought from the Airport were delivered at any place or places requested by them in the Portland downtown area, an area bounded by Columbia Street on the South, Union Station on the North, the Willamette River on the East, and 16th Avenue on the West (Tr. 72, 73, 77). The discharge places in the downtown area varied from day to day (Tr. 88, 90).

(5) When it was necessary for appellant to dispatch a limousine to the airport to meet an arriving plane at times when there were no passengers to be transported to the airport. Appellant's limousine would go directly from Appellant's garage to the airport without going to or making any stops in downtown Portland (Tr. 79), and when a limousine returned from the airport without passengers, it returned directly to the garage without going to the downtown area at all (Finding 14, Tr. 47, 79, 80, 87, 90).

(6) Appellant's attorneys advised Appellant that its limousine service did not constitute transportation within the meaning of Sec. 3469 (Exs. 1, 14, Tr. 16, 17). In addition, Appellant was informed by a Deputy Collector of Internal Revenue at Portland, Oregon that its limousine service was not subject to the tax (Ex. 1, Tr. 16, 17). Based upon this information, as well as upon the advice of its attorneys, Appellant neither collected nor paid any tax on account of the transportation of passengers in its limousine (Tr. 80, 81).

(7) A bus with a capacity in excess of ten adult passengers was used by Appellant on only one occasion (Ex. 2, 3, 4).

(8) Appellant's one-way charge for airline passengers was increased from 85¢ to $1.00 by agreement with Northwest Airlines on August 21, 1949 (Ex. 22, Finding 24, Tr. 49), but Appellant's one-way charge for airline employees was not increased from 60¢, the fare charged prior to August 21, 1949 (Ex. 21, 22).

(9) Appellant did not collect or attempt to collect any sum as a tax for any limousine service from any passenger transported by it in its limousines (Tr. 80, 81). The fares collected by Appellant for the transporting of airline passengers and employees between the downtown area of Portland and the Airport by limousine did not include any transportation tax (Exs. 6, 7, 8, 9, 10, Tr. 80, 81). No part of such fares was set aside by Appellant or regarded by it as a tax (Tr. 81).

(10) The tax assessment involved in this case was paid by Appellant from its own funds (Tr. 82) and no part of the tax was "passed on" and collected by Appellant from its passengers.

(11) None of the limousine revenue was shown on Appellant's books as a tax obligation, but, to the contrary, the entire amount of the limousine revenue was included in Appellant's income (Ex. 6-10).

(12) Appellant's failure to collect the transportation tax from airline passengers for limousine transportation furnished by Appellant was due to reasonable cause and was not willful.

(13) The limousine service provided by Appellant was irregular and it was not operated with any degree of regularity between definite and fixed points. Appellant did not operate its vehicles " on an established line" within the meaning of sec. 3469.

for the reasons that each and all of said facts are clearly established by uncontradicted evidence; consequently a proper and just determination of the issues in this case cannot be made without taking into consideration all of

these facts along with other facts set forth in the findings made by the court.

II

The trial court erred in making its findings of fact (Tr. 42-50) in that they are clearly erroneous for the reason that they omit the material and uncontradicted facts set forth in Specification of Error I and in that they are contrary to the uncontradicted evidence in this case.

III

The trial court erred in finding and concluding (Conclusion of Law 1, Tr. 50) that Appellant in transporting airline passengers and employees in its limousines between the downtown area of Portland and the Portland Airport operated said vehicles "on an established line" within the meaning of sec. 3469 for the reason that the uncontradicted evidence clearly shows that Appellant was not operating its limousines "on an established line" within the meaning of said code section, and that such finding and conclusion is not supported by and is contrary to the evidence and is contrary to law, and for the further reason that such finding and conclusion is based upon only a portion of the evidence, the court having disregarded the facts set forth in Specification of Error I.

IV

The trial court erred in treating Regulation 42, Section 130.58 as though it had the force and effect of law (Tr. 32) for the reason that the interpretation embodied

in the said regulation must be confined within the limits of sec. 3469, and insofar as the regulation exceeds the limits of congressional enactment, it is void and may be disregarded.

V

The trial court erred in making its Conclusion of Law 2 (Tr. 50), which is as follows:

> "The Commissioner's assessment and the collection of said taxes, penalty and interest by defendant was proper and plaintiff has failed in its burden of proof to overcome the correctness of said assessment."

for the reason that sec. 3469 expressly provides that the tax imposed thereby shall apply to transportation by motor vehicles such as limousines, "only when such vehicle is operated on an established line," and Appellant's limousines were not operated on an established line within the meaning of said code section, and for the further reason that said conclusion is not supported by and is contrary to the uncontradicted evidence and is contrary to law, and for the further reason that the trial court in making said conclusion misconstrued the meaning of the term "operated on an established line" and misconstrued the meaning of the term "willfully," and on the further ground that said conclusion is based on only a portion of the evidence, the trial court having disregarded the facts set forth in Specification of Error I.

VI

The trial court erred in finding and concluding (Conclusion of Law 3, Tr. 50) that the fares paid to Appel-

lant by limousine passengers traveling to or from the airport included the transportation taxes, and that any part of said fares was collected by or paid to Appellant as a tax for the reason that said finding and conclusion is not supported by and is contrary to the uncontradicted evidence, and is contrary to law, and for the further reason that said conclusion is based on only a portion of the evidence, the trial court having disregarded the facts set forth in Specification of Error I.

VII

The trial court erred in making and entering its judgment dismissing Appellant's complaint for exactly the same reasons as are specified in Specifications of Error III, V, and VI.

ARGUMENT

I and II

The Findings of Fact are clearly erroneous in that they omit material, uncontroverted facts clearly showing (1) that Appellant was not operating its limousines "on an established line"; (2) that Appellant did not collect any taxes from the airline passengers on account of transportation in its limousines; and (3) that Appellant did not willfully fail to comply with any provisions of the Internal Revenue Code.

The Findings of Fact are clearly erroneous in that they are contrary to the uncontradicted evidence in this case.

1. *The Court of Appeals may review the evidence in this case.*

This court has the authority to review the evidence in this case.

In considering the scope of its authority to review findings of fact pursuant to Rule 52 (a) of the Rules of Civil Procedure, this Court in the course of its opinion in *Equitable Life Assurance Society of the United States v. Irelan,* 123 F. 2d 462, 464 (9th Cir. 1941) said:

> "Rule 52 (a) of the Rules of Civil Procedure, 28 U.S.C.A. following Section 723 c, was intended to accord with the decision on the scope of the review in federal equity practice . . ."

In the case of *Katz Underwear Co. v. United States,* 127 F. 2d 965, 966 (3d Cir. 1942), the Court said:

> "In a case tried without a jury, Civil Procedure Rule 52 (a), 28 U.S.C.A. following Section 723 c, governs . . . This Rule permits review to the extent formerly allowed in federal equity practice. 3 Moore's Federal Practice, Section 52.01, p. 3118. In equity if it clearly appeared that the Court misapprehended the evidence its findings of fact may be set aside."

2. *The trial court clearly misapprehended the evidence.*

The testimony and evidence offered by Appellant at the trial was not contradicted, nor were any of Appellant's witnesses impeached. Yet, the trial court, in making its findings, failed to include therein material, uncontroverted facts established by the evidence, but instead included facts that are in conflict with the uncontradicted evidence. Generally, uncontradicted testimony must be followed where the witnesses who offered the testimony are not impeached, and when the testimony is not contradicted by physical or other facts actually proved, or when the testimony is not inherently im-

probable. *Grace Bros., Inc. v. Commission of Internal Revenue,* 173 F. 2d 170 (9th Cir. 1949).

That the trial court clearly misapprehended the evidence of this case is shown by conflicts between the Court's opinion and the evidence, conflicts between the Court's opinion and the Court's findings, and conflicts between the Court's findings and the evidence.

All of the facts set forth under Specification of Error I, pages 17-19 hereof, were established by clear uncontradicted evidence. Those facts are material to a proper decision of this case and each of them was either ignored by the Court completely or was only partially included in the Court's findings. In addition, findings made by the Court insofar as they are contrary to those set forth under Specification of Error I are erroneous, are not supported by the evidence, testimony or exhibits, and cannot be even properly inferred therefrom.

An analysis of the trial court's opinion in the light of the Court's own findings, as well as the uncontradicted evidence, will illuminate the picture and clear away the haze of vague inferences which apparently caused the trial court to completely misapprehend the full import of the evidence in this case.

The trial court, obviously impressed by the case of *Royce et al. v. Squire,* 73 F. Supp. 510 (D.C. W.D. Wash. 1947), affirmed on other grounds, 168 F. 2d 250 (9th Cir. 1948), in its written opinion in this case stated as follows:

> "There is no need for reviewing the facts in this case. They are similar to those outlined in Royce,

et al. vs. Squire, Collector, 73 F. Supp. 510 (D.C. Wash. 1947)." (Tr. 32)

A review of the facts in this case by the trial court would have disclosed to the Court that the similarity to the facts outlined in the findings in the *Royce* case is that both cases involve transporation of airline passengers by limousine. The facts found by the Court in the *Royce* case disclose that the limousine company there conducted its operations in a manner substantially different from that of Appellant.

It is submitted that the trial court's opinion is more consistent with the facts and findings of the *Royce* case than with the facts, or even the findings, of the instant case. The distinctions to be found in the material facts of this case and those of the *Royce* case are legion. A comparison of the findings in the *Royce* case with the facts of this case discloses the following major distinctions, all of which bear upon one or more of the issues determined adversely to Appellant in this case.

(1) In the *Royce* case the limousine company employed a dispatcher who dispatched limousines on call from the airlines and who ordered the limousines to the different destinations. (*Royce* Findings XI, XIV, 73 F. Supp. at 512). In the instant case the Appellant employed no dispatcher, and Appellant's drivers called the airlines prior to scheduled flights to learn the names of the passengers, if any, and where to pick them up (Finding 12, 13, Tr. 46, 68).

(2) In the *Royce* case, the limousine company was required to meet all incoming planes and frequently

limousines would be dispatched to the airport without passengers (*Royce* Finding XIV, 73 F. Supp, at 512). In the instant case Appellant's limousines were not required to meet any planes unless there were passengers on the arriving plane who desired limousine service. If there were no passengers desiring limousine service, no limousine would be sent (Finding 15, Tr. 47, 69, 78, 79).

(3) In the *Royce* case, the limousine company instructed its drivers to follow the most direct route and the drivers usually used either of two streets (*Royce* Finding XII, 73 F. Supp. at 512). In the instant case, Appellant did not instruct its drivers as to any route whatsoever (Finding 20, Tr. 48, 74, 86, 90).

(4) In the *Royce* case, 50% of all airline passengers used the limousine service (*Royce* Finding XIII, 73 F. Supp. at 512). In the instant case, only 25% of airline passengers used the limousine service (Finding 18, Tr. 48). This factor alone would cause the service furnished by Appellant to be far more irregular than that furnished by the limousine company in the *Royce* case.

(5) In the *Royce* case, passengers being brought from the Airport were delivered to the Seattle Metropolitan area (*Royce* Findings XI, 73 F. Supp. at 512). In the instant case, Appellant's limousines would deliver arriving passengers to any point in downtown Portland to which the passengers desired to go, or would deliver the passengers at any place outside of the downtown area, if such place were in the general direction between the Airport and downtown Portland (Finding 11, Tr. 46, 72, 73, 76, 77).

(6) In the *Royce* case, the drivers employed to drive the Airport limousine informed the passengers that Federal transportation tax was included in the fares paid by them (*Royce* Finding XVIII, 73 F. Supp. at 513). In the instant case, no part of the fare was treated by Appellant as a tax (Tr. 80, 81, 93) and Appellant's drivers never informed any passengers that there was any tax on the fares (Tr. 87, 90, 91).

(7) In the *Royce* case the cash fares and tax were maintained as separate items, and the amounts billed monthly to and collected from the airlines included the tax on the transportation as a separate item. The amounts collected as taxes were posted monthly to a ledger account entitled "Federal Transportation Tax." (*Royce* Finding XIX, 73 F. Supp, at 513). In the instant case the books of Appellant do not reflect either the collection of any transportation tax from its airport limousine passengers or the billing or collection of any item as taxes from the airlines, as no tax was collected. Appellant, however, did carry on its books and records an account entitled "Other Current Liabilities, Transportation Tax," showing tax liability for other transportation furnished by Appellant, which transportation was not by limousine and was subject to tax (Finding 28, Tr. 50, 93, Ex. 6, 7, 8, 9, 10).

(8) In the *Royce* case, part of the money collected from the airline passengers was posted on the limousine company's books as an accrued liability account as tax collected and was never closed into profit and loss nor taken into revenue for income tax purposes (*Royce* Findings XIX, 73 F. Supp. at 513). In the instant case

the full amount of the fares paid by the airline passengers was reported as income by Appellant and was carried on the Appellant's books as revenue (Tr. 92, 93, Finding 28, Tr. 50).

(9) In the *Royce* case the limousine company filed tax returns reporting the sums of the monthly total collected as taxes on cash fares and the monthly total billed to and collected from the airline as taxes (*Royce* Findings IV, XIX, 73 F. Supp, at 511, 513). In the instant case Appellant did not collect any transportation tax from its airport limousine passengers (Tr. 80, 81), and did not report any portion of the money collected from such passengers as a tax on its transportation tax returns.

(10) In the *Royce* case, the limousine company's fares were increased to coincide in amount and time with each tax rate increase passed by Congress (*Royce* Finding XVII, 73 F. Supp. at 513). In the instant case, fares were increased on August 21, 1949. The increase was unrelated to any tax rate increase, was almost 14 months after a Deputy Commissioner of Internal Revenue advised Appellant that in his opinion Appellant's limousine service was subject to the transportation tax (Ex. 21, Findings 22, 24, Tr. 49), and clearly does not coincide in time either with a tax rate increase or with the Deputy Commissioner's letter.

Thus, many of the facts found material by the Court in the *Royce* case are not present in the instant case, and as shown by the numbered parapraphs (1) to (10), material differences exist, not only as to the basic issue

(Specification of Error III, discussed ante), but also as to whether Appellant collected any taxes from the airline passengers (Specification of Error V, discussed ante). There is no real similarity in the factual situations to justify the Court's reference to the *Royce* case as authority for any finding or decision in the instant case.

The findings prepared by Appellee's attorneys and approved by the trial court are actually in conflict in certain respects with the opinion, as illustrated, in part, by the following language in the opinion dealing with the regularity of Appellant's limousine service, the very crux of this case:

> "Plaintiff's [Appellant's] service was supplemental to the air service, and was irregular only to the extent that inclement weather and other conditions postponed or cancelled air travel. The company and not the passengers determined the pick-up points in downtown Portland and the routes between such pick-up points and the airport." (Tr. 32, 33)

The Court's statement that the limousine service furnished by Appellant was irregular only to the extent that inclement weather and other conditions postponed or cancelled air travel is not a correct statement of the facts in this case. The court's findings (Finding 15, Tr. 47), the stipulated facts set forth in the Pre-Trial Order (PTO 14, Tr. 26), and the evidence (Tr. 69, 78, 79) disclose that Appellant's limousines were not driven to the airport to meet incoming planes unless there were passengers who desired or might desire transportation by limousine. As a result, there were times when airplanes would arrive in or leave the airport without Appellant's

limousines making any trip to the airport. Appellant's service was supplemental to air service only in that it was furnished solely to airline passengers and employees.

That Appellant's limousine service was irregular to a much greater extent than apparently believed by the trial court, as indicated in its opinion, is further illustrated by the facts that only 25% of all airline passengers used limousine service (Finding 18, Tr. 48); trips were not made unless passengers desired service and planes would arrive at or leave the airport without Appellant's limousine making any trips to the Airport (Finding 15, Tr. 47); and that 10% of all flights were postponed (Finding 18, Tr. 48). It is only the irregularity caused by this 10% of which the court took cognizance in its opinion. The other facts were either ignored or their importance not fully appreciated by the trial court.

The language of the second sentence above quoted from the court's opinion is also contrary to the uncontradicted testimony and, in part, it is also contrary to the court's findings in this case. Insofar as the trial court believed and stated that Appellant, "not the passengers determined the pick-up points in downtown Portland," the court erred and the statement is incorrect, is not supported by even a scintilla of evidence and is directly contrary to the stipulated facts (PTO 10, 12, Tr. 24, 25), the evidence (Tr. 83) and to the findings prepared by Appellee and approved by the court (Findings 10, 13, Tr. 45, 46).[1]

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[1]Finding 10, Tr. 45, reades in part as follows: ". . . The plaintiff [Appellant] did not determine the 'pick-up' points in the downtown area. The airline companies established them at points convenient to their passengers . . ."

The airline companies and the passengers, not the Appellant, determined the pick-up points in downtown Portland, and Appellant merely went to places decided upon by the passengers and the airline companies (Finding 10, Tr. 45, 83). Arriving passengers had the right to and did select any place or places to which they desired to be taken and Appellant's limousines did deliver the passengers to such palce or places selected by them so long as the places selected were in the general direction between the Airport and downtown Portland (Finding 11, Tr. 46, 76), or were at any point in the downtown area of Portland (Finding 11, Tr. 46, 72, 73, 77). Insofar as Finding 11 states that passengers were delivered only to places in downtown Portland that were in the general direction between designated points, that finding is not correct, and is contrary to the facts and evidence of this case (Tr. 72, 73, 77).

The opinion is also in error insofar as the trial court stated that Appellant determined the route between the pick-up points and the Airport. The airline companies, by selecting the airport to which the limousine was to travel, and the airline companies and the passengers, by designating the pick-up and discharge points, controlled the route followed.[2]

Appellant's drivers followed streets of their own choice in driving to and from the airport, and their choice varied from day to day, trip to trip (Tr. 87, 89, 90). Appellant did not instruct or direct its drivers as to

[2]Finding 7 sets forth that the service was to be furnished by Appellant to planes arriving or departing from the Portland Airport or Troutdale Field (Tr. 44).

which routes they were to follow in traveling between the downtown area of Portland and the airport. The particular route in each instance and for each trip was selected by the driver to suit his own driving convenience[3] (Finding 20, Tr. 48, 75, 76, 83, 87, 90). The mileage traveled by Appellant's limousine to or from the airport was ten (10) miles in all but a few instances, according to the trial court (Tr. 33, Finding 16, Tr. 48), but the evidence discloses that one-way trips range between 9 and 12 miles (Ex. 2, 3 and 4). Even the variance indicated by the court (ranging between 9 and 11 miles), (Tr. 33) is substantial in view of the short distance to be traveled, and clearly establishes that the route varied with each trip.

The trial court in its opinion (Tr. 34) cited the decision of this Court in the *Royce* case, 168 F. 2d 250 (9th Cir. 1948), wherein that case was affirmed on the ground that the passengers and not the limousine company had paid the taxes. This point will be discussed in detail under Specification of Error V. It will now suffice to point out that the trial court once again clearly misapprehended the facts relating to this issue, failing to observe the factual distinctions between this case and the *Royce* case. In reaching its decision that the "tax was included in the fares paid by the passengers," the trial court, in its opinion, stated as follows:

> "It is also significant that *shortly* after the Deputy Commissioner ruled that plaintiff was sub-

[3]In the *Royce* case the limousine drivers were instructed to use the most direct route between the metropolitan area of Seattle and the Airport, and usually followed one of two streets (*Royce* Finding XI, 73 F. Supp. at 512).

> ject to the transportation tax, the fares were raised from 85 cents to $1.00. In my view the tax was included in the fares paid by the passengers." (Emphasis supplied) (Tr. 34)

The fare increase was made August 21, 1949, and applied only to fares paid by airline passengers. Fares paid by airline employees were not increased. The letter from the Deputy Commissioner referred to in the opinion was dated June 30, 1948 (Ex. 21, Tr. 98, Finding 22, Tr. 49). Almost fourteen months had elapsed between the date of the letter and the date of the agreement increasing the fares.[4] In the *Royce* case, we saw that fare increases coincided exactly in time and amount with tax rate increases (page 28, supra).

It is summitted that if the increase in Appellant's fares can be connected to any one factor it is to the rise in costs which occurred in the years after the second world war. There is absolutely no connection between the increase in Appellant's limousine fares and the matter of the transportation taxes, either in point of time or otherwise. To attempt to connect the increase with the tax and the Deputy Commissioner's letter by characterizing a lapse of almost fourteen months as "shortly after" is not reasonable. The decision on this issue, as on others, indicates that the trial court did not clearly apprehend the evidence or grasp all the facts necessary to properly decide this case.

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[4]The eighty-five (85c) fare charged passengers had been in effect in 1944 (Ex. 11), and was not increased prior to August 21, 1949. In October, 1950, the fare was increased from $1.00 to $1.25, which increase coincided with the rise in prices following the outbreak of the Korean War.

The statements expressed by the trial court in the opinion more clearly disclose the basis of its decision than do the findings prepared by the Appellee after the trial court had already decided the case. It is in the opinion that we learn the elements relied upon by the trial court in deciding this case, and these elements disclose the clear misapprehension of the facts under which the trial court labored. Even the findings of fact are contray in part, to the statements made in the opinion.

In view of the foregoing, this is clearly a proper case for this court to review the evidence as authorized by Rule 52 (a) of the Federal Rules of Civil Procedure and the decisions of this court thereunder.

III and IV

Appellant in transporting airline passengers and employees in its limousine did not operate said vehicles "on an established line" within the meaning of sec. 3469.

Regulation 42, Section 130.58 must be confined within the limits of sec. 3469 and insofar as the Regulation exceeds the limits of Congressional enactment, it is void.

1. *The term "established line" as used in sec. 3469 means the passage of public conveyance to and fro between distant points with regularity over a route established by governmental authority.*

Congress enacted the present law taking the transportation of persons as a part of the Revenue Act of 1941. Public Law 250, 77th Congress (Ch. 412, 1st Sess.). Between the time sec. 3469 was adopted and the period involved in this case it remained unchanged, ex-

cept that the rate of taxes was changed from time to time.

For the purpose of this case, the pertinent provision of sec. 3469 is as follows:

> ". . . Such tax shall apply to transportation by motor vehicles having a passenger seating capacity of less than 10 adult passengers, including the driver, only when such vehicle is operated on an established line."

Thus, the ultimate question is whether or not Appellant operated its limousines "on an established line" within the meaning of sec. 3469.

In ascertaining Congressional intent, some assistance is normally obtained by referring to the report of the Committee which considered and brought forth the legislation being interpreted. The following extract is taken from the report from the Committee on Ways and Means of the House of Representatives:

> "*Transportation of persons*—A tax of 5 per cent is imposed upon the amount paid within the United States for the transportation of persons by rail, motor vehicle, water or air. *Transportation by motor vehicle seating less than 10 persons is exempt . . .*" (Emphasis supplied) House of Rep. Report No. 1040, 77th Cong., 1st Sess., C.B. 1941-2, 413 at 440.

It is thus to be seen that Congress intended generally to exclude from sec. 3469 transportation by motor vehicle seating less than 10 persons. The words "operated on an established line" should be strictly construed, having in mind the nature of the business to which the tax applied, in order to carry out the intent expressed in the Committee reports.

The statute should be interpreted to accomplish the stated intent of Congress. Since the statute does not define the term "operated on an established line," the words should be accorded their usual significance. In *Trenton Cotton Oil Company v. Comm.*, 147 F. 2d 33, 36 (6th Cir. 1945), the court said:

> "The statute does not define the term 'stock or securities', and it is therefore necessary to resort in interpreting the provision to the common and ordinary meaning of these words."

Where a statute uses the words and terms without specifically defining their meaning, such words and terms are considered to have their ordinary and settled meaning. Where the applicable section of an act deals with a trade or business, the words must be considered to have been used in the sense in which such terms are generally used or understood in the particular business. We are, consequently, concerned with what the term "established line" means when used with regard to transportation of persons by motor vehicle.

Let us first consider the word "line" as defined by the dictionary. In Webster's Encyclopedic Dictionary (1940) that word is said to mean—

> "A series of public conveyances, as buses, steamships, airplanes, & c., passing between places with regularity."

The above meaning was judicially approved in the case of *Bruce Transfer Company v. Johnston*, 227 Iowa 50, 53; 287 N.W. 278, 280 (1939), as follows:

> ". . . What was the meaning of the word 'line' as so used, at the times in question? Century Dictionary—

> 1889—Line: 'A series of public conveyances, as coaches, steamers, packets and the like, passing to and fro between places with regularity.' . . . 'Stage-line', 'railroad line' and 'automobile line' are expressions which are ordinarily understood to mean a regular line of vehicles for public use operated between distant points, or between different cities."

From these definitions we learn that a "line" means the passage of public conveyances to and fro between distant points with *regularity,* but we are dealing with more than merely a "line". Our immediate concern is with "an established line". Lexicographers state that the adjective "established" means "made stable or firm; fixed or secured in some way." Webseter's New International Dictionary of the English Language (2d Ed. Unabridged 1950), p. 874.

A state statute using the words "established route" was construed in *Public Utilities Commission v. Pulos,* 75 Utah 527, 538, 286 Pac. 947, 952 (1930), to mean a "route having legal existence." The court relied on the general definition by lexicographers, and held a route could not be established by acts of private persons. In the course of its opinion, the court said:

> ". . . It would seem reasonably clear that an established route must be a route that has a legal existence . . . It cannot well be said that a route along a public highway can be established by acts which are prohibited by law, nor by the acts of private persons or corporations."

From this it becomes apparent that there must not only be a "line"—a passage to and fro with *regularity,* but the "line" must be "established" in order to take

transportation by motor vehicles seating less than 10 persons out of the exception enacted by Congress into sec. 3469. We have seen, too, that to be an "established line", the line must be established on a firm or permanent basis by public authority and not by act or agreement of private persons and corporations.

This is the common meaning of the term "established line" when used with reference to the transportation of persons. In 1941, when this Revenue Act was passed, lines of motor vehicles were commonly established only by public authority. When Congress used the words "operated on an established line" it had reference solely to an established line of motor vehicles, constituted as such by proper public authority. That is the only meaning that can be fairly ascribed to the language selected by Congress in view of the words used both in the Act and in the Committee Report. There is absolutely nothing to indicate that Congress used the term with any other meaning in mind.

No authority, private or public, established or attempted to establish any line over which the Appellant was to or did operate its limousines (Finding 20, Tr. 49). Appellant's limousines were not "operated on an established line" as the term is commonly understood and as it was intended by Congress to be understood.

2. *Appellant was not authorized under the laws of the State of Oregon to operate its airport limousine service on "an established line".*

Under the laws of the State of Oregon in effect in 1940 a carrier could not operate on "an established line"

unless it had a permit to do so issued by the Public Utilities Commissioner of Oregon. The applicable statutes of Oregon in force at that time were contained in Chapter 467, Oregon Laws 1947, and Chapter 488, Oregon Laws 1949. The first mentioned chapter enacted a motor transportation code, which contained provisions as follows:

> "Section 9. 1. Permit to Operate. It shall be unlawful for any person to operate any motor vehicle on any highway in this state as a common carrier, either as a fixed termini or anywhere-for-hire carrier, a contract carrier or private carrier in the transportation of persons or property or both without first applying for and obtaining, in addition to the license required by law, a permit from the commissioner covering the proposed operation. . . ." (page 774)

> "No vehicle shall be operated in more than one of the classes covered by the provisions of this act, provided, that vehicles carrying persons may also carry baggage and express or be operated as charter cars; provided further, . . ." (page 775)

Section 6, as enacted by the 1947 Legislature, was amended by Chapter 488, Oregon Laws of 1949 to read, in part, as follows:

> "3. Common carriers shall be classified according to the types of services rendered or offered, to be determined under the following terms and conditions, which classifications will be shown on the common carrier's permit when issued or reissued by the commissioner.

> "(a) *Regular Route, Scheduled Service: A carrier operating in this class* is any person who or which undertakes to transport persons or property, or both, or any class or classes of property, by motor vehicle for compensation *between fixed termini and over a regular route or routes upon established or fixed*

schedules. Such carriers shall file a schedule setting forth the termini between which service is rendered, the hours of departure and arrival, and tariffs and classifications governing rates.

"(b) *Irregular Route: A carrier operating in this class* is any person who or which undertakes to transport persons or property, or both, or any class or classes of property, by motor vehicle for compensation *over irregular routes*. Such carriers shall file tariffs and classifications governing rates. Persons operating charter busses are required to file a tariff that fixes a charge for use of vehicles on an hourly or mileage basis for each vehicle listed in the permit.

"Except as hereinafter otherwise provided, irregular route common carriers defined above shall serve indiscriminately the territory which they are authorized to serve, *and their service shall be on call, coincidental, non-scheduled, unperiodical, itinerent and ambulatory in nature, and such carriers shall not:* (1) By solicitation, advertisement, or by a course of dealing or practice, or otherwise, *hold themselves out to render regular service between any particular points or over any particular route* or routes, or lead shippers to believe or understand that they may rely upon a continuous regularity of service by such carriers between particular or specified points or over any particular or specified route; (2) in the solicitation of business or the advertising of their service restrict or limit such solicitation or advertising to traffic moving between any particular or specified points or over any particular or specified route or routes; (3) operate with continuing regularity under a pre-determined plan of operation or time schedule or approximate time schedule between any particular points or over any particular route; provided, however, that the provisions of this sub-paragraph (3) shall not be construed to prohibit, and shall not apply to, repeated movements by such carriers over the same route or between the

> same points in instances where the character or volume of the traffic requires more or less continued and repeated movements over the same route for such reasonable periods of time as may be necessary to meet the demands of a particular shipper in particular instances." (pages 743 and 744) (Emphasis supplied)

In July, 1950, the Plaintiff had no permit to operate anywhere as a regular route scheduled service carrier, except between Government Camp and Timberline. Other than this its Oregon Public Utilities Commission Permit was to operate only as an irregular route carrier.

3. *Regulation 42, Section 130.58 must be confined Within the limits of sec. 3469, and insofar as the Regulation exceeds the limits of the Congressional enactment, it is void and may be disregarded.*

Regulation 42, Section 130.58 states:

> "Sec. 130.58. *Motor Vehicles with Seating Capacity of Less Than 10.*—No tax is imposed on transportation by a motor vehicle having a seating capacity of less than 10 adult passengers, including the driver, unless such vehicle is operated on an established line. The term 'operated on an established line' means operated with some degree of regularity between definite points. It does not necessarily mean that strict regularity of schedule is maintained; that the full run is always made; that a particular route is followed; or that intermediate stops are restricted. The term implies that the person rendering the service maintains and exercises control over the direction, route, time, number of passengers carried, etc. It implies also that the primary contract between the operator and the person served is for the transportation of the person and not for the hire or use of the vehicle."

As we have seen, the word "line" connotes regularity. To operate on a line would obviously mean to operate with regularity. That is the meaning of the language Congress used. The Regulation under discussion cannot minimize or change this statutory requirement.

In the case of *Morrill v. Jones,* 106 U.S. 466, 467, 1 S. Ct. 423 (1882), the Supreme Court in considering a regulation made by the Secretary of the Treasury with respect to a statute dealing with import duties said:

> "The Secretray of the Treasury cannot by his regulations alter or amend a revenue law. All he can do is to regulate the mode of proceeding to carry into effect what Congress has enacted."

In *Allis v. LaBudde,* 128 F. 2d 838, 840 (7th Cir. 1942), the Commissioner by regulation approved by the Secretary of the Treasury attempted to limit the scope of a provision of the Internal Revenue Code. The court said:

> ". . . Although the Commissioner with the approval of the Secretary, is authorized to prescribe all needful regulations for the enforcement of Revenue Acts, it needs no argument that he cannot by such regulations alter or amend an Act, or limit rights granted by it. "

In *Smith v. Commissioner of Internal Revenue,* 142 F. 2d 818, 819 (9th Cir. 1944), this Court stated:

> ". . . we need not consider Article 22 (a)-1 of Treasury Regulations 101, promulgated under the Revenue Act of 1938; for that which is not income cannot be made income by Treasury Regulations."

In *Hawke v. Commissioner of Internal Revenue,* 109 F. 2d 946, 949, (9th Cir. 1940), this Court said:

> ". . . Departmental regulations may not invade the field of legislation, but must be confined within the limits of congressional enactment . . ."
>
> "If the regulations go beyond what Congress can authorize or beyond what it has authorized, they are void and may be disregarded . . ."

In accord with the foregoing decisions of this Court are *Commissioner of Internal Revenue v. Van Vorst,* 59 F. 2d 677 (9th Cir. 1932) and *New Idria Quicksilver Mining Co. v. Commissioner of Internal Revenue,* 144 F. 2d 918 (9th Cir. 1944).

The foregoing cases clearly establish that under the provisions of the Revenue Act giving the Commissioner of Internal Revenue authority to prescribe rules and regulations, the Commissioner does not have power to change or alter the law, and a regulation creating a rule out of harmony with the statute is a nullity. No regulation can change what the Act meant.

Had Congress intended to qualify the meaning of the word "line", this could easily have been accomplished, but when it did not so do, we are compelled to act on the assumption that Congress intended it to have its ordinary meaning. If Congress had intended an interpretation of the term "on an established line" different from that ordinarily understood, Congress could have easily expressed its intention in apt language.

4. *Even by the very test set up in the Regulation, Appellant was not operating its limousines "on an established line".*

The Regulation states that the term "operated on an established line" means operated with some degree of regularity between definite points. Appellant's limousine service was an irregular one and was not authorized by the statutes of the State of Oregon quoted above to be operated between definite or particular points or over any specified or regular route.

That the limousine service was operated within the authorization of the statutes of the State of Oregon and Appellant's license is established by the uncontradicted evidence.

Approximately ten (10%) percent of the flights were postponed (Finding 18, Tr. 48). Regardless of the number of takeoffs and landings at the airport, if there were no airline passengers to deliver to the airport or none arriving at the airport who desired or might desire limousine service, no limousine trips were made (Finding 15, Tr. 47, 88, 90). Where trips were made, the times of departure of the limousines were governed by the airlines (Finding 13, Tr. 46). Only twenty-five (25%) percent of the airline passengers used limousine service (Finding 18, Tr. 48). Running under such uncertain and fluctuating conditions is not an operation with that "degree of regularity" contemplated by the Regulation, and most certainly would not be an operation with the regularity implied by the word "line" written into the statute by Congress.

There were no definite points at which passengers were either picked up or discharged (PTO 10, 12, Tr. 24, 25, Finding 10, Tr. 45, 75, 88, 90). The limousines would take arriving passengers to any place in the downtown district where they wanted to get out (Tr. 72, 73, 77) or would take the passengers to any place on the East side of Portland in the general direction between the airport and downtown Portland (Finding 11, Tr. 46). The places where passengers were "picked up" were designated by the airline companies and the passengers to suit the convenience of the latter, and not by Appellant (PTO 12, Tr. 25, Findings 10, 13, Tr. 45, 46, 75, 83, 84, 86, 90). The discharge points varied from day to day, trip to trip (Tr. 88, 90).

Under such conditions, the Appellant's airport limousine service was clearly not operated with that degree of regularity between definite points contemplated by the Regulation.

In the language of the Regulation, the term "operated on an established line" implies that the person rendering the service maintains and exercises control over the direction, route, time, number of passengers carried, etc. The facts clearly establish that Appellant did not maintain and exercise such control.

Appellant had no control whatsoever over the time and number of persons carried (Findings 10, 12, Tr. 45, 46). Whether Appellant's limousines made any trips to the airport depended upon factors beyond the control of the Appellant. The route to be followed going to or from the airport depended upon the location of the

pick-up points, the particular ariport to which or from which the passengers were taken, and the discharge points designated by the passengers. These factors also controlled the direction of travel and were all without the control of the Appellant. The limousine service being limited to airline passengers and employees was subject, insofar as the factors indicative of control mentioned in the regulation are concerned, to the control of the airline companies and not Appellant. Tested by the language of the Regulation, Appellant did not maintain or exercise the control which is implied in the term "operated on an established line."

A brief summary of the facts will show that even by the definition of the Commissioner embodied in the Regulation Appellant did not operate its limousines "on an established line." Appellant did not establish any points between which it operated its limousine service (Tr. 82, 83). It did not prepare or publish any schedule under which it operated (Finding 28, Tr. 48, 49, 68, 82, 83, 91). The limousines followed no set route (Tr. 75). Each driver selected the streets over which he traveled going to or returning from the airport and would leave the street selected if requested so to do by the passengers. Even the streets selected by the driver varied from trip to trip (Finding 20, Tr. 48, 75, 76, 83, 87, 90). No public authority specified any route (Finding 20, Tr. 49, 69, 82). The points to which the limousines were driven were controlled by the airline companies and the passengers (Finding 10, Tr. 45, 83). Appellant merely furnished cars and drivers and followed the orders given by the airline companies and the passengers (Tr. 83).

The airline companies could, on 30 days notice in the case of Northwest Airlines, Inc., and without notice in the case of the other airlines, terminate Appellant's service and arrange for other transportation for the passengers and employees[5] (Ex. 22, Tr. 106).

These facts certainly show that Appellant did not have, maintain and exercise control as required by the Regulation, or operate an established line of motor vehicles as contemplated by sec. 3469.

5. *Revenue Ruling 54-47 confirms the Appellant's limousine service is not subject to the transportation tax.*

A recent ruling of the Internal Revenue Service shows that the airline limousine service furnished by Appellant was not subject to the transportation tax imposed by sec. 3469. The ruling is as follows:

> "Where limousines are operated to and from an airport and surrounding areas and passengers are picked up or delivered at any place or places designated by them, as distinguished from fixed pickup and discharge points established by the limousine company, such vehicles are not considered operated on an established line within the meaning of Section 3469 of the Internal Revenue Code. If such vehicles have a seating capacity of less than 10 adult passengers, including the driver, the tax on the transportation of persons is not applicable to amounts paid for such transportation." Rev. Rul. 54-47, I. R. B. 1954-5, 16, C. B. 1954-1, 296.

In view of the well recognized principals of law hereinbefore set forth, it is no more than to be expected than

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[5]Appellant had no contract with the other airlines (Tr. 69, 70).

that the Bureau would ultimately rule as above indicated. It must be noted that within the language of the ruling where passengers "are picked up *or* delivered at any place or places designated by them, as distinguished from fixed pickup and discharge points established by the limousine company" (emphasis supplied), the limousince service is not considered as being operated "on an established line" within the meaning of sec. 3469. It has been noted herein that the uncontradicted facts in this case conclusively show that the airline company and their passengers determined the pickup points prior to each trip (Finding 10, Tr. 45, 75, 86, 88, 90); that the Appellant had no control whatsoever over the points at which its limousines were to pick up the passengers (Findings 10, 13, Tr. 45, 46, 75, 86, 88, 90); and that the passengers were delivered at any "place or places designated by them" within the operating area of Appellant's airport limousine service, whether in downtown Portland (Tr. 72, 73, 77, 88, 90, 91) or on the East side of the city (Finding 11, Tr. 46, 76).

Under no stretch of the imagination were the "pickup and discharge points established by the limousine company" (Appellant); consequently, in the light of the ruling, it is readily apparent that Appellant's operation was not "on an established line" within the meaning of the statute. This case comes clearly within the facts of the rule announced by Revenue Ruling 54-47.

V

The fares paid to Appellant by limousine passengers traveling to or from the airport did not include any transportation tax.

The fares collected by Appellant from the airline companies, their passengers and employees for transportation by limousine did not include any amount as transportation tax.

The Court clearly erred in finding (Finding 25, Tr. 49) and concluding (Conclusion 3, Tr. 50, 51) that the money paid to Appellant for airport limousine transportation included transportation tax. As in other instances herein mentioned, this error resulted from the fact that the trial court clearly misapprehended the uncontradicted evidence in this case. This is illustrated by the following language from the Court's opinion:

> "Lastly, in the case of Royce, et al. vs. Squire, Collector, 168 F. 2d 250, the Court of Appeals affirmed the judgment of the trial court on the ground that the plaintiff was not the real party in interest because it was the passengers and not the plaintiff who paid the tax. In order to avoid the force of that decision, the plaintiff now contends that it, rather than the passengers, paid the tax. It is significant, however, that the price charged for rides on the bus, which rides were admittedly not exempt from the transportation tax, was the same as the fare charged to the passengers using the limousine.
>
> "It is also significant that shortly after the Deputy Commissioner ruled that plaintiff was subject to the transportation tax, the fares were raised from 85 cents to $1.00. In my view the tax was included in the fares paid by the passengers." (Tr. 34)

The trial court was evidently greatly impressed by the decision of this Court in the *Royce* case, cited by it in the portion of the opinion quoted above, and, to some extent at least, regarded this Court's decision in the *Royce* case as controlling here. It is submitted that the decision of this Court in the *Royce* case was based upon facts not present in the instant case, and that the decision there is neither pertinent nor applicable here, let alone controlling.

The facts which Judge Healy, in writing this Court's opinion in the *Royce* case, cited in holding that the limousine company had passed the tax on to the airline passengers, are as follows:

(1) When sec. 3469 became effective, the limousine company "increased the fare to cover the tax."

(2) As the tax rates were increased, "like fare increases were made" by the limousine company.

(3) In case of inquiry of the passengers, the limousine company's drivers stated "that the fare paid included the tax."

(4) Where "passengers were carried at the expense of an airline, the latter was billed the agreed amount per passenger plus an additional amount separately billed as a tax."

(5) "The fares and the taxes were in all instances maintained as separate items" on the limousine company's books.

(6) The limousine company filed returns reporting "the sum of the monthly total of taxes collected" for its limousine service, as entered on its books.

(7) The sums, entered by the limousine company on its books as taxes, were not treated as reve-

nue or "reported as income" by the limousine company "during any of the period" there involved.

Based on the foregoing facts, this Court held, in the *Royce* case, that the limousine company had passed the taxes on to the passengers and that the limousine company "neither bore the burden of the tax, refunded the amounts collected, nor obtained authority to sue from those who did bear the burden."

An examination of the facts of the instant case disclosed the following, numbered to correspond with the numbers used in discussing the facts of the *Royce* case:

(1) and (2) The only increase in fares during the period here involved occurred on November 21, 1949, and was not related to any tax increase.[6]

(3) Appellant's drivers did not state to passengers that the fares included any transportation tax (Tr. 87, 90, 91).

(4) The airlines were billed only the agreed amount by Appellant and were not billed any additional amount as a tax.

(5) All fares were maintained as a single item of revenue on Appellant's books (Exs. 6, 7, 10).

(6) Appellant reported no part of the fares collected from airline passengers for limousine service in its transportation tax returns.

(7) The entire amount of fares paid to Appellant by the limousine passengers was treated by Appellant as revenue (Finding 28, Tr. 50, 92, 93).

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[6]Evidence at the trial disclosed an additional fare increase to $1.25 after July, 1950, which increase was mentioned in Note 4, Page 33 of this brief.

Thus, none of the facts enumerated above from the *Royce* case and upon which the decision of this Court in that case were based, were present in the instant case.

During the entire period of its operation, Appellant has been consistent in its position that the airport limousine service was not subject to taxation. It was not a new contention of the Appellant as indicated by the Court's use of the word "now" in the portion of the opinion quoted above. Appellant never set up any part of limousine fares as a tax, but included the full amount of each fare in its income (Tr. 80, 81, 93). It consistently, from the outset, contended that no tax was collected from its limousine passengers, and did not raise that contention merely at the trial. The Commissioner recognized that Appellant did not collect any tax on account of its airport limousine service prior to the period here involved (Ex. 21). That Appellant did not change its operation and start collecting such tax for the period after June 30, 1948, is no more emphatically illustrated than by the fact that the full amount of the fares paid by the limousine passengers was included in Appellant's revenue (Ex. 6, 7, 10). All these facts are consistent only with the fact that Appellant regarded the service as not subject to the transportation tax and that Appellant did not collect the tax from the passengers.

The trial court was so impressed by the fact that the one time a bus was used, the same fare was charged as charged for limousine service, that the trial court set forth this fact in the opinion as a foundation for its decision on this issue. Aside from the fact that it is per

passenger less expensive to use a bus,[7] one uncontradicted fact stands out. That fact is, that the amount Appellant was authorized to charge each passenger was limited by its arrangements with the airlines to $1.00 (Ex. 22). These arrangements contemplated the use of limousines. Appellant had no choice, if it used a bus, but to absorb the tax out of its usual fare. Out of almost 800 trips, a bus was used but once. That single, isolated instance was one of two factors on which the trial court's decision on this issue was based.

The other factor mentioned by the court was that the fare was raised on August 21, 1949 (Tr. 34). In this connection, the court views the raise as having been prompted by the letter of June 30, 1948, (Ex. 21) written by Mr. D. S. Bliss, a Deputy Commissioner. What Mr. Bliss wrote is no more than an opinion and it was and is in no way binding upon the Appellant. The Appellant at no time acquiesced in the opinion. Since 1948 there has been a constant argument with the Bureau about whether Appellant's operation was subject to the tax under sec. 3469 (Tr. 68).

Mr. Bliss wrote about the facts as they were on or before January 5, 1948. The fact that the fare was then 85¢ for passengers and 60¢ for airline employees, and that a year and a half afterwards the fare specified in the contract of August 21, 1949 (Ex. 22) was $1.00 for passengers and 60¢ for airline employees, has nothing whatsoever to do with this case. Costs went up and so

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[7]Sixteen passengers were brought from the airport early in the morning the one time a bus was used (Ex. 2). It would have required at least two limousines to carry that number of passengers.

did the fare. That is the only reason for the increase. If the court was correct that the fares were increased to cover the tax, then the fares charged to the airline employees would have also been increased at the same time. Yet, such fares were not raised. The court's belief that there was a relationship between the fare increase and Mr. Bliss' letter is not warranted from the facts.

The evidence shows, from the meager facts recited by Mr. Bliss, that he was mistaken with respect to the nature of Appellant's operation. One thing the letter does acknowledge and that is that Appellant was not collecting the tax, and that never changed (Tr. 80, 81).

The tax assessment involved in this case was paid by Appellant from its own funds and Appellant is the proper party to sue for a refund (Tr. 82).

VI

The Commissioner's assessment and the collection of the taxes, penalty and interest by Appellee was not proper.

1. *The Commissioner's assessment and the collection of the taxes by the Appellee was not proper.*

In the first instance since Appellant did not operate its limousine "on an established line" the fares paid by the limousine passengers were not subject to transportation tax. Even aside from that fact, however, the assessment by the Commissioner and the collection by Appellee of the taxes involved in this case was not proper.

The contradicted evidence clearly established that Appellant did not collect any taxes from its airline

passengers for transportation to and from the airport by limousine (Tr. 80, 81). The full amount of the fares paid by the passengers was entered in Appellant's books as revenue (Exs. 6, 7, 10, Tr. 80, 81, 93), no part of the fares was entered on Appellant's books as a tax obligation or a liability and no part of the fares was deducted from Appellant's income as a tax liability (Finding 28, Tr. 50, Exs. 6, 7, 10).

In view of the foregoing, there are absolutely no facts, testimony, or evidence upon which a finding or conclusion can be based that Appellant collected any taxes from the airline passengers for its limousine service.

Sec. 3469 imposes a tax upon the person purchasing the transportation and not upon the company furnishing the same.[8] In view of the fact that Appellant collected no tax from the limousine passengers, the assessment by the Commissioner and the collection by the Appellee was not proper.

2. *The Commissioner's assessment and the collection of the penalty was not proper.*

The trial court's conclusion that the penalty was properly assessed stands merely as a naked holding neither supported by the evidence nor grounded upon any finding that appellant "willfully," capriciously, or

[8]If the failure is willful, the party failing to collect the tax may be subject to a penalty of 100% of the amount of the tax. This, however, would be imposed by Sec. 1718(c) and not by Sec. 3469. This was recognized by the Deputy Commissioner in his letter of June 30, 1948 to The Gray Line Company (Ex. 21, Tr. 98).

without reasonable cause failed "to pay, collect or truthfully account for and pay over" any taxes. A close scrutiny of the findings (Tr. 42-50) fails to disclose even an inference from which one can deduce that Appellant willfully failed to comply with sec. 3469, or with any other provision of the Internal Revenue Code. The only finding made by the trial court with respect to the penalty is that Appellant paid the penalty from its own funds (Finding 27, Tr. 49, 50).

It is no wonder that the findings of the trial court are silent on this point. Not a scintilla of evidence can be found either in the testimony or in the exhibits that even tends to establish that Appellant willfully failed to comply with sec. 3469. The findings are silent because the record contains nothing to which either Appellee or the trial court could point as a basis for a factual finding that Appellant "willfully," capriciously, or without reasonable cause failed to comply with sec. 3469.

In its opinion (Tr. 33) the trial court stated that the penalty was properly assessed, basing its determination on the warning conveyed to Appellant by the Deputy Commissioner on June 30, 1948 (Ex. 21). In Exhibit 21 the Deputy Commissioner expressed his opinion that sec. 3469 applied to Appellant's limousine service and concluded that a failure by Appellant to collect the tax on such transportation in the future as it had in the past would be regarded as willful.

Supported by the advice of its attorneys, Appellant believed that its airport limousine service was not subject to the tax imposed by sec. 3469, and believed in

good faith and still believes that the Deputy Commissioner was wrong. Appellant therefore continued operating exactly as it had in the past without collecting any tax from the airline passengers (Tr. 80, 81). Appellant's failure to follow the interpretation placed upon sec. 3469 by the Deputy Commissioner, rather than that of its attorneys, does not constitute a willful failure to comply with the Revenue Code and is not sufficient to subject Appellant to the penalty provision. Such action is neither capricious nor unreasonable. The facts disclose that Appellant has consistently, since this matter was first raised, contended that sec. 3469 did not apply to its airport limousine service (Exs. 11, 14, Tr. 68).

At the outset Appellant submitted this matter to Mr. Stewart Lamb, Special Deputy Tax Collector in the Office of the Collector in Portland, Oregon, who ruled that Appellant was not liable for the taxes on the transportation of the airline passengers. Appellant has consistently and continuously relied upon this ruling (Ex. 1, Tr. 16, 17).

In addition, Appellant submitted this matter to its tax attorneys for their opinion as to the applicability of sec. 3469 to its airport limousine service. Appellant's attorneys advised Appellant that its limousine service was not subject to such tax, but was specifically exempted therefrom. During the entire period Appellant consistently took the position in reliance upon the advice of its attorneys and the information furnished by the Special Deputy Tax Collector that its airport lim-

ousine service was not subject to the tax imposed by sec. 3469 (Ex. 1, Tr. 16, 17, Ex. 14).

Negotiations with regard to the asserted tax liability have been continuously conducted by Appellant and Appellant's attorneys and representatives of the Commissioner over a lengthy period of time. Any penalty for a willful failure to pay taxes under these circumstances is entirely unwarranted. The word "willfully" as used in sec. 1718(c) requires more than an intentional and deliberate non-compliance with the Internal Revenue Code in order to bring the penalty provision into play. The word "willfully" as used in sec. 1718(c) means "without reasonable cause," or "capricious." See *Kellems et al v. United States et al.*, 97 F. Supp. 681 (D. C. Conn. 1951). In *New Oakmont Corporation v. United States*, 86 F. Supp. 897, 899 (Ct. Cl. 1949), the court stated:

> "A taxpayer should not be subjected to a penalty unless he comes fairly clearly within the situation which is defined in the law as deserving to be penalized."

Clearly, the only way to characterize Appellant's conduct in this case is as conduct reasonably to be expected of any taxpayer having an honest dispute with the Commissioner as to the correct interpretation of a section of the Internal Revenue Code. In no other way except that selected by Appellant could the Deputy Commissioner's interpretation have been tested in court. If, by such action, Appellant "comes fairly clearly within the situation which is defined in the law as deserving to be penalized," how then could any taxpayer ever

safely test the Commissioner's interpretation of the code? If such were the law, no taxpayer, irrespective of how reasonable his position may be, or how openly, honestly and in good faith he asserts it, could seek a court decision on the Commissioner's interpretation, without incurring a penalty. The law does not place such a burden upon the taxpayer. The Commissioner's fallibility has been too often demonstrated by numerous court decisions to justify the imposition upon Appellant of a 100% penalty for contesting the Commissioner's interpretation, where, as here, such contest has been made openly, in good faith, with reasonable cause and on the advice of attorneys.

Whatever the final decision in this case may be, it is clear that Appellant had reasonable cause for its belief that it was not subject to the taxes for which assessment and collection was made. Appellant's honest and consistent contention that sec. 3469 did not and does not apply to its airport limousine service supported as it was by advice of its attorneys in the highly complicated and specialized field of taxation, was and is reasonable and not capricious. Under no circumstances should Appellant be subject to a penalty for openly contesting, in good faith, the Commissioner's interpretation of sec. 3469.

VII

Conclusions of Law 1, 2 and 3, not being supported by the evidence and being contrary to the evidence and the law are clearly erroneous.

The discussions heretofore presented the lengthy questions of law and fact raised by Conclusions of Law 1, 2 and 3. Each of these conclusions is clearly erroneous and the judgment based thereon, being based on erroneous conclusions, is therefore also erroneous.

CONCLUSION

From the foregoing analysis of the law and evidence, it is apparent that all of the conclusions of law made by the trial court and the trial court's decision and judgment in favor of the Appellee and dismissing Appellant's complaint with prejudice are clearly erroneous and that the judgment of the trial court should be reversed.

Respectfully submitted,

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